IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1064 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HIRABHAI GALJIBHAI GARASIYA

Versus

STATE OF GUJARAT

Appearance:

MS SADHANA SAGAR for Appellants No. 1-2

MR KP RAWAL, APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE M.C.PATEL

Date of decision: 26/11/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. The appellants - original accused nos.1 and 3, by filing this appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'), have challenged the judgment and order dated October 21, 1994 passed by the learned Sessions Judge, Panchmahals at Godhra in Sessions Case No.55 of 1994 by which the appellants came to be convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code (to be referred as 'I.P.C.' for short) and sentence imposed on them of R.I. for life and fine of Rs.500/- each, in default, R.I. for three months.

2. The prosecution case is summarised as under:

2.1 The appellants and the family of the deceased Titabhai Kamjibhai were relatives and staying in the same village namely Mota Salra, Taluka Santrampur, District Panchmahals. On November 27, 1993, around 6.00 p.m., p.w.2 Kaneshbhai Titabhai, son of the deceased alongwith his family members was at his house. At that time, the appellant no.1, who happens to be the uncle of p.w.2, came to his house and shouted the name of Titabhai (hereinafter referred to as 'the deceased'). The appellant no.1 told the deceased that they should smoke a bidi. Saying so, the deceased and the appellant no.1 had gone towards the field and had smoked bidi. At that time, the appellant no.1 had tried to drag the deceased. While dragging, the appellant no.1 called his brothers Shanker Galji (absconding since the pendency of Sessions Case) and appellant no.2 Chaudabhai Galjibhai to bring sticks. Absconding Shanker Galji and appellant no.2 rushed towards the appellant no.1 carrying sticks. One stick was having iron rings. The deceased had tried to ran away from the clutches of appellant no.1 and while running away, he had fallen down. The appellant no.1 had taken the iron rings stick from absconding accused and had given fatal blows on the head and other parts of the body of the deceased. The appellant no.2 and absconding accused Shanker Galji had also inflicted blows with sticks which they were carrying on other parts of the body of the deceased. The deceased, due to infliction of fatal blows on his head and neck portion, had fallen down and had expired on the spot. P.W.2 Kaneshbhai had gone to Fatehpura Police Station to lodge F.I.R. against the appellants and other accused persons. P.W.8 P.S.I. Natwarsinh Jhala who, at the relevant time, was discharging his duties at Fatehpura Police Station, registered the F.I.R. at I.C.R. No.159 of 1993 against the appellants and other accused persons for offences

punishable under Sections 302, 34 and 114 of the I.P.C. P.W.8 P.S.I. Jhala held inquest of the dead body of the deceased and had sent it for Post-Mortem to Community Health Centre, Fatehpura. P.W.1 Dr. Maganbhai Bhedi had performed the post-mortem on November 28, 1993 between 11.30 a.m. and 1.45 p.m. P.W.8 P.S.I. Jhala had drawn the panchnama of the place of incident and had collected blood-stained earth and other incriminating articles from that place. Statements of various witnesses were also recorded on the same day. The appellant no.1 and one another accused Kalu Abji (accused no.2 who has been acquitted by the Sessions Court) were arrested on November 28, 1993 under an arrest panchnama. The appellant no.1, while in custody, had shown willingness to produce the iron shod-stick with which he had inflicted blows on the body of the deceased. The said stick was discovered in the presence of two panchas by drawing a panchnama under Section 27 of the Evidence Act. The incriminating articles collected during investigation were sent to F.S.L. for chemical analysis. The investigation of the offence was handed over by p.w.8 P.S.I. Jhala to another P.S.I. namely, p.w.9 P.S.I. Menat. P.W.9 P.S.I. Menat had arrested appellant no.2 original accused no.3 on January 30, 1994, who was till then absconding. The Muddamal stick which was used in the commission of the crime was also recovered at the instance of the appellant no.2 under a discovery panchnama. On receipt of the report from the F.S.L. and on the completion of the investigation, p.w.9 P.S.I. Menat had filed chargesheet against the appellants and other accused in the Court of learned JMFC, Santrampur, District Panchmahals for offences punishable under Sections 302, 34 and 114 of the I.P.C. which came to be numbered as Criminal Case No.258 of 1994. As the offence under Section 302 is exclusively triable by the Court of Sessions, the learned JMFC, Santrampur committed the case to the Court of Sessions, Panchmahals for trial which came to be numbered as Sessions Case No.55 of 1994 of the Court of Sessions, Panchmahals at Godhra.

3. Charge (Exh.2) was framed against the appellants and other accused persons for offence under Section 302 read with Section 34 of the I.P.C. The charge was read over and explained to all the accused persons wherein they pleaded not guilty and claimed to be tried. In order to prove the charge against the accused persons, the prosecution examined:

(i) P.W. 1 - Dr. Maganbhai Chunibhai Bhedi, Medical Officer, Community Health Centre at Exh.9
(ii) P.W. 2 - Complainant Kaneshbhai Titabhai at

Exh.17

(iii) P.W. 3 - Pushpaben Titabhai, daughter of the deceased at Exh.19

(iv) P.W. 4 - Monghiben Ramjibhai, sister-in-law of the deceased at Exh.20

(v) P.W. 5 - Panch Sardarbhai Khamjibhai at Exh.21

(vi) P.W. 6 - Panch Vaghjibhai Gautambhai at Exh.23

(vii) P.W. 7 - Panch Virsinh Thavrabhai at Exh.25

(viii) P.W. 8 - P.S.I. Jhala at Exh.27 and

(ix) P.W. 9 - P.S.I. A.S. Menat at Exh.28

The prosecution produced documentary evidence such as inquest panchnama, panchnama of the scene of offence, map of the scene of offence, post-mortem notes, discovery panchnama of Muddamal sticks, arrest panchnama, report of F.S.L. etc. to prove the case against the appellants and other accused persons.

4. On the completion of the recording of the evidence of the prosecution, the appellants were questioned with regard to the evidence led by the prosecution and their statements came to be recorded under Section 313 of the Code. The defence of the appellants was of general denial. No defence witness was examined by the appellants and other accused persons.

5. The learned Sessions Judge, on appreciation of oral as well as documentary evidence and after hearing the arguments of the learned Additional Public Prosecutor and the learned advocate for the accused persons, deduced that it was proved beyond doubt that deceased Titabhai Kamjibhai had died a homicidal death and that the appellants and other accused persons had a lurking suspicion that p.w.2 Kaneshbhai had eloped with the sister of the present appellants and, therefore, there was motive behind the commission of the murder of the deceased. The learned Sessions Judge further deduced that the evidence of p.w.2 complainant Kaneshbhai, p.w.3 Pushpaben Titabhai and p.w.4 Monghiben Ramjibhai was trustworthy and reliable and their presence at the place of the incident was natural. He also deduced that the evidence of the above eye-witnesses had proved beyond doubt that the appellant no.1 had called the deceased to smoke bidi and, on that excuse, had taken him towards the field and thereafter, had called his brothers and the acquitted accused no.2 Kalu Abjibhai to bring sticks to beat and kill the deceased. The learned Sessions Judge had also deduced that there was prior meeting of mind between the appellants and other accused persons to kill the deceased as they had a suspicion that the son of the deceased namely, p.w.2 Kaneshbhai had eloped with Kanta

who is the sister of the appellants and absconding accused Shanker Galjibhai. It was also deduced that the appellants had a common intention to cause the murder of deceased Titabhai and in furtherance of their common intention, the appellants had inflicted blows with the respective sticks, which they were carrying, on the vital parts of the body of the deceased which had resulted into his death. It was deduced that all the appellants, in furtherance of their common intention to cause the death of the deceased, had acted cruelly and had selected vital parts of the body of the deceased for inflicting blows with sticks. It was further deduced by the learned Sessions Judge that the blows inflicted on the body of the deceased by the appellants and other accused persons were sufficient in the ordinary course of nature to cause death. It was held by the learned Sessions Judge that the evidence of eye-witnesses was fully corroborated by medical evidence as well as report of F.S.L. which had proved beyond doubt that the appellants had given fatal blows on the body of the deceased to cause his murder. On the above referred to conclusions, the learned Sessions Judge convicted the appellants for offence punishable under Section 302 read with Section 34 for causing the murder of deceased Titabhai and sentenced each of them to suffer R.I. for life and fine of Rs.500/- each, in default, R.I. for three months which had given rise to filing of this appeal. It may be mentioned that original accused no.2 Kalu Abjibhai was acquitted from the charges as his name was not disclosed in the F.I.R. and his presence was doubtful at the place of the incident.

6. Learned advocate for the appellants Ms. Sadhana Sagar and learned Additional Public Prosecutor Mr. K.P. Rawal have taken us through the entire record and proceedings. It is submitted by the learned advocate for the appellants that the presence of appellant no.2 original accused no.3 was not proved beyond doubt as p.w.3 Pushpaben Titabhai had not mentioned the name of the appellant no.2 as the assailant who had inflicted blows with sticks on the deceased. It is submitted that in view of the inconsistency in the evidence of the eye-witnesses, a reasonable benefit of doubt be extended in favour of appellant no.2 and that he be acquitted and the appeal be allowed accordingly. The counsel for the appellants has also submitted that all the eye-witnesses were related to the deceased and their presence at the place of the incident was doubtful and looking to the distance between their house and the place of incident, it should be held that they could not have witnessed the incident in question. The learned advocate for the

appellants further submitted that the incident had taken place around 6.00 p.m. on November 27, 1993 wherein winter season had already set-in and there was no sufficient light and the witnesses could not have seen the real occurrence of the incident and, therefore, benefit of doubt should be extended in favour of all the appellants and they be acquitted and the judgment and order of conviction and sentence be quashed and the appeal be allowed.

7. We have also heard learned Additional Public Prosecutor Mr. K.P. Rawal at length. The learned APP has submitted that the evidence of eye-witnesses was reliable and trustworthy and their evidence cannot be discarded mainly on the ground that they are related to the deceased. It is submitted by the learned APP that on the contrary, if the witnesses are related, they would not spare the real culprit and would not falsely involve an innocent person. The learned APP submitted that the presence of eye-witnesses was natural as the incident had started from their place of residence and they had followed the deceased when he was dragged by the appellant no.1. The learned APP has submitted that the prosecution had proved beyond doubt that the appellants and the absconding accused had formed common intention to commit the murder of deceased Titabhai and, in furtherance of their common intention, had brought sticks on the command being given by the appellant no.1 after the deceased was dragged. He also submitted that all the appellants had acted cruelly and had given fatal blows with their respective sticks which had resulted into the death of the deceased Titabhai and, therefore, the appeal be dismissed and the conviction and sentence imposed on the appellants be confirmed.

8. It is not in dispute that deceased Titabhai Kamjibhai died a homicidal death. The evidence of P.W.1 Dr. Bhedi and the post-mortem notes (Exh.35) had proved beyond doubt that the deceased had died due to heavy bleeding from the injuries sustained on the skull and also due to fracture and injuries on the head as well as on the brain. Therefore, the finding of the learned Sessions Judge that the deceased had died a homicidal death deserves to be confirmed.

9. The evidence of p.w.2 complainant Kaneshbhai and p.w.4 Monghiben had disclosed that the appellants and other accused persons wanted to take revenge on the deceased and his family members as p.w.2 Kaneshbhai had eloped with their sister Kanta for 10-12 days. To take revenge on the family of the deceased, the present

appellants and absconding accused Shanker Galji had made up their mind to take revenge by committing murder of deceased Titabhai. The evidence of the eye-witnesses had further disclosed that as per pre-arranged plan, on November 27, 1993, around 6.00 p.m. the appellant no.1 had come near the house of the deceased and had called his name and invited him for a bidi. On that excuse, the deceased was taken at a distance from his house and thereafter he was dragged and as pre-planned, the appellant no.1 had shouted names of his brothers and had called them to come with sticks. The eye-witnesses' account had further disclosed that as per pre-arranged plan, the appellant no.2 and absconding accused Shanker Galji had arrived near the place of the incident carrying one iron shod-stick and two other sticks to inflict blows on the body of the deceased. The evidence of eye-witnesses, in our opinion, even though challenged in the cross-examination, had not been destroyed. The evidence of above two eye-witnesses also gets corroboration from the evidence of p.w.3 Pushpaben who happened to be the daughter of deceased Titabhai and who was aged about 13 years at the time of recording of the evidence. The counsel for the appellants had challenged this evidence on the ground that during her oral testimony, she had not mentioned the name of the appellant no.2 as the person who had inflicted stick blows on the deceased. In our opinion, the submission of the learned counsel for the appellants does not deserve any merit. In her police statement, she had already disclosed the name of the appellant no.2 as the person who had launched murderous assault on the deceased. Furthermore, this omission was not brought on record in the evidence of Investigating Officer who had recorded the statement of the witnesses during the investigation. Therefore, the contradiction/omission found in the evidence of p.w.3 of not mentioning the name of appellant no.2 was not brought on the record nor was it proved in the eye of law. Not mentioning the name of appellant no.2 in the oral testimony of p.w.3 Pushpaben will not assume much importance as other eye-witnesses as in the F.I.R. (Exh.18) it was already disclosed that the appellant no.2 was also carrying a stick and had inflicted blows with that stick on the body of the deceased. The evidence of eye-witnesses also gets corroboration from medical evidence and the report of F.S.L. which indicates that blood of the group of the deceased was found on the stick recovered from the appellant no.1. Thus, the evidence of eye-witnesses had proved beyond doubt that the appellants and other accused persons had formed a common intention to commit the murder of the deceased as they wanted to take revenge on

the family of the deceased because of the fact that p.w.2 Kanesh, who is the son of the deceased, had eloped with their sister Kanta for 10-12 days. There was motive on the part of the appellants and the absconding Shanker Galji to take revenge by committing murder of the deceased. The appellants and other accused persons, in furtherance of their common intention, hatched a conspiracy to commit the murder of the deceased by getting assembled at a place where the deceased was dragged and arriving at the place of incident with iron shod-stick and other sticks. All the appellants had selected vital parts of the body of the deceased for inflicting blows with sticks. As per post-mortem notes (Exh.35), the deceased had sustained following external injuries:-

(1) There were 5x1.5x1 and 6x1.5x1.5 cm contused slanting wounds on the back portion in the middle of the head and it's skull was completely fractured.

(2) There was a 6x2x2 cm contused slanting cut wound on the back side of the ear in the left portion of the head. It's skull was completely fractured.

(3) There was continuous bleeding from all the aforesaid three wounds and the blood was frozen on external portion. A portion of the brain had come out from the wound injury no. (2).

(4) Left eyeball was broken and the blood was frozen.

(5) There was contused wound on Nasal tip.

(6) There was fracture on both capillary tubes with contused wound on left hand wrist.

10. According to the evidence of p.w.1 Dr. Bhedi who had performed the post-mortem, the above injuries were sufficient in the ordinary course of nature to cause the death of Titabhai. In our view, both the appellants had acted cruelly in inflicting blows with sticks on the vital parts of the body of the deceased. We, therefore, hold that both the appellants had common intention to commit the murder of the deceased and, therefore, their conviction recorded by the learned Sessions Judge under Section 302 read with Section 34 of the I.P.C. deserves to be confirmed. Consequently, the sentence imposed on them of R.I. for life on each and a fine of Rs.500/- on each, in default, R.I. for three months on each

appellant also deserves to be confirmed. As a result of the foregoing discussion, we do not find any merit in the present appeal and the same is dismissed. The conviction of the appellants under Section 302 read with Section 34 of the I.P.C. is confirmed and the sentence imposed on each of them of R.I. for life and fine of Rs.500/-, in default, R.I. for three months is also confirmed. No orders of disposal of Muddamal is passed since the Sessions Case against the absconding accused Shankerbhai Galjibhai is pending.

(M.H. Kadri, J.)

(M.C. Patel, J.)

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